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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1055

HONORABLE W. HAROLD COX, UNITED STATES DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, PETITIONER

v.

HONORABLE ROBERT E. HAUBERG, UNITED STATES ATTORNEY FOR SOUTHERN DISTRICT OF MISSISSIPPI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals sitting *en banc* (Pet. App. A1-A57) are reported at 342 F. 2d 167. The order of the district court (Pet. App. A59-A61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1965. The petition for a writ of

certiorari was filed on April 12, 1965. The jurisdiction of this Court is invoked under 28 U.S. 1254(1).

QUESTION PRESENTED

Whether a district judge has authority to compel a United States Attorney to sign proposed indictments when the Attorney General has determined that prosecutions would not be warranted and has instructed the United States Attorney not to sign the indictments.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The pertinent provisions of the Constitution, and the Federal Rules of Criminal Procedure, and of relevant statutes, executive orders and reorganization plans are set forth in the Appendix, *infra*, pp. 22-31.

STATEMENT

The present petition asserts the validity of an order entered on October 22, 1964 by petitioner, District Judge Cox, insofar as it adjudges respondent United States Attorney Hauberg in contempt for declining to obey the judge's direction to prepare and sign certain proposed indictments, notwithstanding express instructions to the contrary from the Acting Attorney General of the United States. The further provision of the order in suit directing that a citation issue to then Acting Attorney General Katzenbach to show cause why he too should not be held in contempt is not before the Court.

1. The basic facts leading to petitioner's order of October 22, 1964, are uncontroverted:

The controversy arises out of the testimony of two witnesses for the United States in a suit brought under the Civil Rights Act against the Registrar of Clarke County, Mississippi and the State of Mississippi to enforce the voting rights of Negroes.[1] The witnesses, Goff and Kendrick, both Negroes, testified that some seven years earlier they had attempted to register at an out-of-door place of registration in Stonewall, Mississippi; that the Registrar, Mr. Ramsey, had declined to register them or give them application forms; that they had seen white persons registering there on that day; and that one white man, B. Floyd Jones, had been near the registration table, had talked to the Registrar, Mr. Ramsey, and had signed the registration book (R. 63-64, 75-79).[2] Ramsey testified that Jones had not registered at that time or place, and his registration book showed that Jones had registered a year earlier at Enterprise (R. 82-87). Jones later testified for the Registrar and State that he was near the registration table in Stonewall and had observed white persons registering there and that he had talked to the Registrar, Ramsey, and had shaken hands with him, but

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[1] *United States* v. *Ramsey*, 331 F. 2d 824, modified on rehearing, 331 F. 2d 838 (C.A. 5).

[2] "R. ——" references are to the record reproduced in the court of appeals.

stated that he was not then registering (R. 97-99, 101-104).

Petitioner, Judge Cox, who was presiding, expressed the view that "this Negro Reverend W. G. Goff and his companion Kendrick" should each be put under a $3000 bond "to await the action of the grand jury for perjury" (Pet. App. A52, n. 21; R. 91-92, see also R. 99-100).

After a full investigation by the Federal Bureau of Investigation into the allegations of perjury against Goff and Kendrick, the Criminal Division of the Department of Justice concluded that there was "no basis for a perjury prosecution," and respondent Hauberg advised Judge Cox of the decision not to prosecute (R. 31). Judge Cox stated his view that the matter was one for a grand jury, and expressed his inclination to appoint an outside attorney to present the matter to the grand jury. After the Department furnished Judge Cox with a memorandum indicating the district court's lack of authority to appoint a special prosecutor, Judge Cox, in another discussion of the matter with respondent Hauberg, emphasized his desire to have the perjury matters presented to the grand jury, and his intent to instruct the grand jury which was to be impanelled shortly on these matters (R. 31-32).

The Criminal Division of the Department of Justice again reviewed the matter and concluded that the charge of perjury could not be sustained (R. 32). Mr. Katzenbach, who was then Deputy Attorney Gen-

eral, reviewed the matter himself, and concurred in the Criminal Division's decision not to prosecute. On September 7, 1963, he went to Jackson, Mississippi and met with Judge Cox. He explained that, because he knew that Judge Cox "had strong feelings in the matter," he "had come to pay him the courtesy of explaining why" the Department of Justice had "arrived at the conclusion that no perjury was involved" (R. 26). Judge Cox remained unconvinced and indicated his belief that Goff and Kendrick had committed "palpable perjury," but stated that he would not instruct the grand jury on the subject (Answer to Petition for Writ of Prohibition in Court of Appeals, p. 9; R. 26).

Approximately one month later Goff and Kendrick were arrested, confined in jail for two days, and placed on $3000 bond for violations of State law for falsely testifying in federal court before Judge Cox in the *Ramsey* case. The arrests were based upon affidavits filed by Tally Riddell, counsel for the Registrar and the State in the *Ramsey* case (R. 38, 43-46, 53). After Goff and Kendrick had been indicted by a State grand jury (R. 38-39, 53-54), the United States, through the Department of Justice, filed suit [3] against the State district attorney to enjoin the State prosecution on the ground, among others, that the purpose and effect of the prosecution was to threaten and coerce Goff and Kendrick and to intimidate them and other Negro voters for the purpose of interfering with their right to vote. In April, 1964, the district court (per Mize, J.) ruled that the threatened State

[3] *United States* v. *Warner* (Civ. No. 1219, S.D. Miss.).

prosecution was barred by the principle announced in *In re Loney*, 134 U.S. 372, and was "contrary to the provisions of 42 U.S.C. 1971(b)" (R. 57-59).

After the federal Grand Jury (which had originally been convened in September 1963) was reconvened in September 1964, the foreman advised the attorney for the government assigned to the jury that Judge Cox has asked the foreman to hear a couple of witnesses on matters unrelated to those then being considered (R. 34). On September 29, Mr. Riddell, counsel for the Registrar and State in the *Ramsey* case, and a State district attorney, came to the courthouse to appear before the Grand Jury.

In a special charge to the Grand Jury, Judge Mize stated that Judge Cox had requested him "to see that these two witnesses had an opportunity to appear before the Grand Jury" (R. 7, 5; Pet. App. A54). Judge Mize advised the Grand Jury of its right to hear the testimony of the two witnesses, but requested them not to do so until October 21, 1964, shortly after Judge Cox was to return from his vacation (R. 7-11).

On October 20, 1964, Mr. Katzenbach, then Acting Attorney General, having been advised by respondent Hauberg that the perjury matters would probably be presented to the Grand Jury when it convened the next day, talked with Judge Cox by telephone, reiterating his view that there was no basis for prosecution (R. 26-27). Judge Cox advised Mr. Katzenbach that he had nothing to do with the matter, except that he had advised Mr. Riddell of the name of the foreman of the Grand Jury, and had suggested that

if he (Riddell) spoke to the foreman, the foreman could have him subpoenaed (R. 27).

On October 21, 1964, Mr. Katzenbach advised Mr. Hauberg that it was still his view that the cases should not be prosecuted, and instructed him not to prepare or sign indictments incorporating these charges—or proposed indictments growing out of other matters which the Grand Jury was considering which had not come to the attention of the United States Attorney or the Department of Justice, and thus had not been investigated (R. 27-28). When the Grand Jury reconvened, Judge Cox advised it that it had authority to hear any witness it desired to hear.

On the morning of October 22, the foreman of the Grand Jury advised Judge Cox in open court that it had three matters under consideration, that it had concluded two of them and that the third was in the process of being concluded (R. 17). He stated that the Grand Jury had requested Mr. Hauberg to assist in preparing true bills, and that Mr. Hauberg had replied that he could not do so without securing permission from the Department in Washington and, later, that he had been instructed not to do so (R. 17-18). The foreman added that the Grand Jury did not know what to do in the event that they should vote for an indictment (R. 17-18). Mr. Hauberg stated that as to one of the matters "the Department of Justice and the United States felt as if the law and the fact was not sufficient to constitute perjury and that an indictment thereon would be no good" (R. 18).

When Judge Cox asked if that was in connection with the two witnesses for the government, Mr. Hauberg replied in the affirmative (R. 18). He also stated that the Attorney General had requested an F.B.I. investigation of the matters with which the United States Attorney and the Department of Justice were not familiar; but that Mr. Katzenbach had instructed him not to proceed or prepare or sign any indictments in any of these three matters (R. 18-19).

Judge Cox then stated (R. 19):

> * * * I here and now order and direct you to disregard your instructions from the Department of Justice and to prepare true bills or no bills as this Grand Jury may direct you to do and to sign those bills or no bills as the Grand Jury may decide under penalty of contempt, * * *.

During a one hour court recess, Mr. Hauberg conferred with Mr. Katzenbach by telephone. The Attorney General specifically instructed Mr. Hauberg not "to prepare or to sign indictments in the matters being heard" by the Grand Jury (R. 20, 28).

When court reconvened, Judge Cox again inquired as to whether Mr. Hauberg would comply with his direction to prepare and sign the indictments. Mr. Hauberg respectfully declined to do so (R. 20-21). Judge Cox forthwith adjudged Mr. Haubert "guilty of civil contempt," ordered him confined to a Hinds County jail, and ordered the issuance of a citation to Acting Attorney General Katzenbach to show cause why he too should not be held in contempt, and stayed the order for five days (R. 1-3, 21-22).

2. Notice of appeal was filed on October 23 by Messrs. Hauberg and Katzenbach (R. 105), and they, together with the United States, filed a petition in the Court of Appeals for the Fifth Circuit for a writ of prohibition, and for a stay of the order of October 22, 1964, pending disposition of the proceedings by that court. By order of October 26, 1964, the court granted such a stay and ordered the proceedings on appeal and on the writ to be consolidated for briefing and argument. Thereafter, the court ordered the proceedings to be heard and determined *en banc*.

The court reversed Judge Cox's order of October 22, holding that the United States Attorney is under no duty to sign an indictment, and that "the affixing or withholding of the signature is a matter of executive discretion which cannot be coerced or reviewed by the courts" (Pet. App. A8). The appeal of the Acting Attorney General was dismissed because the order of October 22, 1964 was, as to him, interlocutory and not appealable (Pet. App. A8-A9). Similarly, the court denied the application for a writ of prohibition, because the reversal of the order of October 22 as to the United States Attorney rendered the writ of prohibition unnecessary as to him, and made it "improbable" that it would be necessary as to the Attorney General (Pet. App. A9).

Judges Jones, Tuttle and Wisdom were of the opinion that, since the district court has no authority to compel the United States Attorney to sign an indictment, it had no authority to compel the United States Attorney to "indulge in an exercise of futility by the preparation of the form of an indictment which he is

unwilling to vitalize with his signature" (Pet. App. A8). Judge Brown agreed that the United States Attorney could not be compelled to sign the indictment, but was of the view that he was required to give assistance to a grand jury, and particularly that he has a duty to the grand jury to prepare a form of indictment when requested to do so (Pet. App. A27-A28, A31-A35).

Judges Rives, Gewin and Bell dissented on the ground that Rule 7(c) of the Federal Rules of Criminal Procedure imposed an affirmative duty upon the attorney for the government to sign an indictment returned by a grand jury (Pet. App. A-10-A27, A14-A18). The dissenters believed that the Fifth Amendment confers upon the grand jury the authority to institute a criminal prosecution, and that a defendant can be required to appear and give bond (or be arrested), and to answer or plead to a grand jury indictment, even if returned over the objection or without the concurrence of the prosecutor (Pet. App. A13-A14, A19-A21). They were of the view that the signature of the government's attorney could be compelled by the court because it was merely an attestation of the act of the grand jury, and thus a "purely ministerial act" (Pet. App. A16-A17).

ARGUMENT

The sole issue raised by this petition is whether a district judge has authority to compel a United States Attorney to sign a grand jury's indictment, and thus to adopt it as a pleading of the United

States, when the Attorney General has determined that no prosecution should be instituted against the defendant and instructed the government's attorney not to sign the indictment.

In our view, a judicial order of this character constitutes an unwarranted intrusion into the executive function of determining whether and when criminal prosecutions on behalf of the United States should be instituted and cannot be sustained without serious and disruptive effect on the orderly administration of criminal justice. By the same token, the decision of the court of appeals denying judicial authority in the premises is not in conflict with any decisions of any other federal courts, but is, rather, in accord with the uniform decisions of this Court and the lower courts confirming the discretionary authority of the Executive, and particularly the Attorney General, to determine whether and when criminal prosecutions are to be instituted. While three judges of the court of appeals dissented, the issues separating the dissenters from the majority were narrow, and all seven of the judges of that court agreed that, in circumstances such as those at bar, the Attorney General's discretion to prevent a prosecution from going forward could not be reversed or coerced by any district judge. Accordingly, there is no occasion for review by this Court.

1. The President's constitutional responsibility and authority to "take Care that the Laws be faithfully executed" (Article II, Sec. 3, *infra*, p. 22), insofar as it pertains to the enforcement of criminal laws and the bringing of prosecutions for offenses against the

United States, has, by statute [4] and executive order,[5] as well as by tradition,[6] been vested in the Attorney General as the chief law enforcement officer of the Executive. The Attorney General has express authority to supervise and direct all United States Attorneys in the performance of their duties, including prosecutions for all offenses against the United States,[7] and he has been given "the function of decision whether and in what manner to prosecute * * * or to abandon prosecution." [8] Accordingly, the courts have consistently held that determinations with respect to the institution of criminal proceedings are committed to the discretion of the Attorney General or other attorney for the government [9] and that the courts have no

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[4] 28 U.S.C. 507, 501, 503, 504, 508, 5 U.S.C. 291, 309, 310.

[5] Executive Order No. 6166, Sec. 5, June 10, 1933, 5 U.S.C. (1958 ed.), p. 141, *infra*, p. 26. See, also, Reorganization Plan No. 2 of 1950, 15 Fed. Reg. 3173, 64 Stat. 1261, 5 U.S.C. (1958 ed.), p. 185.

[6] *E.g., Ponzi* v. *Fessenden*, 258 U.S. 254, 262: "He is the hand of the President in taking care that the laws of the United States * * * in the prosecution of offences, be faithfully executed."

[7] 28 U.S.C. 507.

[8] Executive Order No. 6166, Section 5, June 10, 1933, *supra*.

[9] *E.g., Deutsch* v. *Aderhold*, 80 F. 2d 677, 678 (C.A. 5) (United States Attorney is "vested with complete control over the proceedings, in the exercise of sound discretion"); *Swepston* v. *United States*, 289 F.2d 166 (C.A. 8), certiorari denied, 369 U.S. 812 (same statement); *District of Columbia* v. *Buckley*, 128 F.2d 17, 20 (C.A.D.C.) ("determination of whether and when to prosecute * * * is a matter of policy for the prosecuting officer and not for determination of the

authority to prevent [10] or compel [11] the initiation of such prosecutions. For the same reasons, this Court

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courts"); *Felder* v. *United States*, 9 F. 2d 872, 874 (C.A. 2), certiorari denied, 270 U.S. 648; *Clemons* v. *United States*, 137 F. 2d 302, 305 (C.A. 4); *Cooper* v. *O'Connor*, 99 F. 2d 135, 138 (C.A. D.C.), certiorari denied, 305 U.S. 642; *Brown* v. *United States*, 299 F. 2d 438, 440 (C.A.D.C.); *Ex parte Altman*, 34 F. Supp. 106, 108 (S.D. Cal.); *United States* v. *New York Great Atlantic & P. Tea Co.*, 54 F. Supp. 257, 258 (N.D. Tex.).

[10] *United States* v. *Thompson*, 251 U.S. 407, 412-413 ("the absolute right of the United States to prosecute" held not subject to control by judicial discretion); *Ex parte United States*, 287 U.S. 241, 251 (district court without authority to refuse application of United States Attorney for warrant upon an indictment because such refusal would bar "the absolute right of the United States to prosecute" and the "lawful authority of the United States attorney"); *Goldberg* v. *Hoffman*, 225 F. 2d 463, 464-465 (C.A. 7); *United States* v. *Brokaw*, 60 F. Supp. 100, 101 (S.D. Ill.).

[11] *Moses* v. *Kennedy*, 219 F. Supp. 762 (D.D.C.), affirmed, C.A.D.C. No. 18065, Feb. 16, 1965 (dismissing action to require Attorney General to investigate, arrest and prosecute law enforcement officers of State of Mississippi for asserted violations of Civil Rights Acts); *Miliken, et al.* v. *Stone, U.S. Atty. Gen., et al.*, 7 F. 2d 397, 399 (S.D.N.Y.), affirmed, 16 F. 2d 981 (C.A. 2), certiorari denied, 274 U.S. 748 (dismissing suit to compel enforcement of the provisions of the National Prohibition Act); *Pugach* v. *Klein*, 193 F. Supp. 630, 634-635 (S.D. N.Y.) (dismissing mandamus action to compel United States Attorney to prosecute several persons for alleged violations of the Federal Communications Act); *Parker* v. *Kennedy*, 212 F. Supp. 594 (S.D. N.Y.) (dismissing petition for mandamus to compel the Attorney General and United States Attorney to institute proceedings based upon alleged violations of the antitrust laws); also, *People* v. *Miles*, 177 F. Supp. 172 (W.D. Mich.) (dismissing a mandamus action to compel the United States Attorney to investigate an alleged conspiracy).

early viewed it as settled not only that "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction" of the Attorney General or the United States Attorney, but also that the "courts will not recognize any suit, civil or criminal, as regularly before them if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney [or other designated attorney for the government]". *Confiscation Cases*, 7 Wall. 454, 457. The decision below—that a district judge has no authority to compel the United States Attorney to accept grand jury accusations as a pleading of the United States—is simply a reaffirmation of this settled principle.

2. Against this background, it is difficult to understand the contention that the United States Attorney can be compelled to give validity to an indictment by affixing his signature. The court below holds legally ineffective an indictment (or "presentment") which is not signed by the government's attorney. That conclusion is in accord with Rule 7(c) of the Rules of Criminal Procedure which makes such signature an essential part of a valid accusation. It would seem to follow that the prosecutor's signing—which gives the indictment life—is a meaningful act, not a mere formality. Yet, the petitioner and the dissent below argue that the signature of the government's attorney, albeit indispensable, is no more than a third authentication of the

grand jury's action which the prosecutor has a ministerial duty to affix.

The argument apparently derives from a misreading of Rule 7(c). To be sure, the Rule provides that accusatory pleadings "shall be signed by the attorney for the government." But there is here no unqualified imperative that the prosecutor shall endorse every accusation preferred by the grand jury. The rule merely requires the government attorney's signature on every pleading that is intended to initiate a prosecution. That is plainly shown by the pairing of indictments and informations in the cited provision. It could hardly be argued that an attorney for the government has a ministerial duty to sign every paper entitled "information." The signature requirement of Rule 7(c) simply implements the rule that every pleading of the government in criminal proceedings (Rule 12, Fed. R. Crim. P., *infra*, p. 31) be endorsed by its authorized representative,[12] just as the Civil

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[12] *Crowley* v. *United States*, 194 U.S. 461, 475, relied upon by petitioner and the dissenting opinion for the proposition that the prosecutor's signature does not constitute the adoption of a paper as a pleading, but merely attests the action of the grand jury, was, of course, decided long before the adoption of the Federal Rules. At any rate this Court's statement that "the signature of the United States Attorney merely attests the action of the grand jury," was made in rejecting the contention that an indictment containing the prosecutor's signature should be treated as an information. The Court simply was emphasizing that in an information the charge is "the responsibility of the attorney representing the Government, and imports an investigation of the facts by him in his official capacity" whereas the indictment represents an accusation by the grand jury, based perhaps on its investigation. There is no suggestion in this Court's opinion in *Crowley*

Rules, upon which the Criminal Rules were modeled, require the endorsement of every civil pleading.[13]

3. No contrary inference can properly be drawn from the requirement of the Fifth Amendment that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." That provision makes no affirmative grant of authority to grand juries; it merely confines the power of the government to bring criminal prosecutions. The Fifth Amendment was written for the protection of the rights of individuals, particularly as a security "to the innocent" from the "trouble, expense, and anxiety" which might be caused by "hasty, malicious, and oppressive public prosecutions." *Ex parte Bain*, 121 U.S. 1, 6, 10-12; *Stirone* v. *United States*, 361 U.S. 212, 218. It would be anomalous to read this constitutional provision—conceived as a shield against baseless prosecutions—as compelling the government to institute criminal proceedings where the prosecutor believes the grand jury accusation baseless or otherwise not meriting prosecution.[14]

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that an attorney for the government was required to endorse a grand jury action which he believed to be ill founded.

[13] Rule 11, Fed. R. Civ. P.; Notes of the Advisory Committee to Rules 7 and 12, 18 U.S.C. App., pp. 3414-3415, 3417. Because the defendant's plea in criminal matters is normally made in person and orally in open court, the criminal rules require no signature for the defendant's pleadings. Rules 10 and 11, Fed. R. Crim. P.

[14] As Judge Brown noted (Pet. App. A29-A30):

"The aim of the Grand Jury indictment as the means of protecting the citizen against the initiation of unfound-

To be sure, while the grand jury's primary function is to prevent the prosecutor from instituting unjustified criminal proceedings, the law has committed additional responsibilities to it, particularly the authority to investigate into possible crimes and to make public accusations upon its own initiative. *Hale* v. *Henkel*, 201 U.S. 43; *United States* v. *Thompson*, 251 U.S. 507. But the grand jury remains an "informing and accusing tribunal only." *Charge to Grand Jury*, 30 Fed. Cas. No. 18,255, pp. 992-993 (C.C.Cal., per Mr. Justice Field). Its power to make investigations and public accusations has never been construed to include authority to prosecute the persons accused, or to institute a criminal prosecution over the objection of the prosecutor. On the contrary, Chief Justice Marshall early approved the already established "usage of this country" that the prosecutor and courts would "pass over, unnoticed" grand jury accusations on which the prosecutor "does not think it proper to institute proceedings" *United States* v. *Hill*, 26 Fed. Cas. No. 15,364, pp. 315-316, (C.C. Va.). And while this Court has never specifically ruled on the point, Chief Justice Marshall's ruling has been quoted and cited with approval. *Hale* v. *Henkel*, 201 U.S. 43, 60. Accord: *Confiscation Cases*, 7 Wall 454, 457. As the Court has noted, the grand jury can perform its accusatory function fully, in cases of disagreement between it and the

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ed charges is hardly advanced by a rule that permits the Grand Jury on its own to initiate the prosecution when the conscientious District Attorney knows to a legal certainty that a federal crime cannot be established."

prosecutor, by making a public accusation of the asserted crime in open court. *Hale* v. *Henkel*, 201 U.S. at 62.

4. Petitioner's contention that the decision of the the court below is in conflict with the decisions of this Court and of other courts of appeals (Pet. 12-14) is unfounded.[15] Plainly inapposite are the cases holding that an improper signature by a government attorney on an indictment is not a ground for reversing a conviction based thereon.[16] In each instance the defective signature had been cured by the adoption of the indictment as a basis for prosecution by the United States Attorney. None of those cases remotely involves the situation at bar, the prosecutor's refusal to accept a grand jury accusation as a pleading of the United States.[17]

Petitioner also contends that the decision below is in conflict with language of the decisions of this Court recognizing a grand jury's authority "to return an

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[15] The asserted conflict between the decision below and *Crowley* v. *United States*, 194 U.S. 461, is discussed *supra*, fn. 12.

[16] *In re Lane*, 135 U.S. 443, 449; *United States* v. *Keig*, 334 F. 2d 323 (C.A. 7); *Abramson* v. *United States*, 326 F. 2d 565, 567 (C.A. 5); *Wiltsey* v. *United States*, 222 F. 2d 600 (C.A. 4); *Wheatley* v. *United States*, 159 F. 2d 599, 600-601 (C.A. 4); *King* v. *United States*, 279 Fed. 103 (C.A. 5).

[17] Indeed, the holding of most of those cases is simply that the defendant's failure to raise the asserted impropriety in the signature on the indictment by a pre-trial motion (when the defect could have been corrected) precluded the defendant from attacking a conviction based upon the indictment.

indictment if it finds a reasonable probability that a crime has been committed" (Pet. 8-9, 14; *Sullivan* v. *United States*, 348 U.S. 170, 173). But the court below did not question the right of a grand jury to make a public accusation on its own initiative without the concurrence of the prosecutor; nor do we. And none of the decisions of this Court cited by petitioner concern the issues presented by this case—whether such an accusation becomes a pleading of the United States which institutes a criminal prosecution, and whether the government attorney is required to endorse for the United States an accusation which, after investigation, he deems ill-founded.[18]

In conclusion, we think it appropriate to emphasize the narrowness of the issue which divides the majority and the dissenting judges below. The dissenters, like the majority, expressly recognize the Attorney General's discretionary authority to "refuse to go forward" with the prosecution once the indictment is returned, and the absence of judicial power to compel him to proceed with the prosecution (Pet. App. A21-A22; *United States* v. *Greater Blouse, Skirt & Neckware Contracter Ass'n*, 228 F.Supp. 483, 489-490 (S.D.N.Y.)). The petitioner apparently agrees

[18] The court of appeals below ruled only that the order of the district court should be reversed because the United States Attorney was not required to sign the proposed indictment. In the event that certiorari is granted, however, we reserve the right to support the judgment of the court of appeals for the additional reason that he was not required to prepare the proposed indictments.

(Pet. 10-11).[19] Accordingly, the only practical effect of the asserted authority of the grand jury to institute a criminal proceeding over the objections of the Attorney General would be to put the putative defendants through the inconvenience, expense, and anxiety of being forced to answer to an accusation on which they would never be prosecuted. Such a procedure would impose upon the putative defendant the hardship of raising bond or facing incarceration until the indictment is dismissed. The Federal Rules of Criminal Procedure were specifically designed to avoid this kind of "unnecessary hardship to some defendants." Advisory Committee Notes to Rule 48, 18 U.S.C. App., p. 3438. The public interest does not call for such futile vindication.[20]

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[19] In the court of appeals, petitioner contended that, by virtue of Rule 48(a), the prosecuting attorney no longer had exclusive control over prosecutions, and that the courts "have some brakes or control" over the right of the government" to institute, maintain or abandon prosecutions." Reply Brief of Respondent and Appellee, C.A. 5, Nos. 22,018 and 22,019, pp. 14-15; Main Brief, pp. 25-26. Petitioner now agrees with the majority and the dissenters that Rule 48(a) was intended for the benefit of defendants, and "not to confer prosecution functions upon the court." Pet. 10-11.

[20] The contention of the dissenters below that the grand jury's authority to institute criminal proceedings is necessary to bring its accusations out of "the shadows of secrecy" (Pet. App. A-24-A-25) is not well taken. For the grand jury has the right, and probably the duty to make a public accusation of crime in open court in cases where the prosecutor declines to accept its indictment as a pleading of the United States. See *Hale* v. *Henkel*, 201 U.S. 43, 62. And the prosecutor is as likely to make public his reasons for declining to prosecute at that time, as he is under the procedure advocated by the dissenters.

In the more than 175 years since the adoption of the Constitution, the district court here is apparently the first which has sought to direct the Attorney General or his subordinates to perform such a prosecutorial function. The order of the district court, corrected by the court of appeals, may therefore be viewed as a unique departure from settled law raising no question of general importance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1965

APPENDIX

1. The Constitution of the United States provides in pertinent part:

ARTICLE II

SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *

* * * *

SECTION 3. * * * he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * *

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *

2. Title 5, United States Code, provides in pertinent part:

§ 291. Establishment of Department.

There shall be at the seat of government an executive department to be known as the Department of Justice, and an Attorney General, who shall be the head thereof.

§ 309. Conduct and argument of cases by Attorney General and Solicitor General.

Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits

in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so.

§ 310. Conduct of legal proceedings.

The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceedings is brought.

3. Title 18, United States Code, provides in pertinent pa t:

§ 3771. Procedure to and including verdict.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and inincluding verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the district of the Canal Zone and the

Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

4. Title 28, United States Code, provides in pertinent part:

§ 501. Appointment of United States attorneys.

The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.

§ 503. Appointment of attorneys.

The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.

§ 504. Tenure and oath of office; revomal.

(a) The United States attorney for each judicial district shall be appointed for a term of four years * * *. Upon the expiration of his term a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.

(b) Each United States attorney shall be subject to removal by the President. Each assistant United States attorney and each attorney appointed under section 503 of this title shall be subject to removal by the Attorney General.

(c) Each of such officials, before taking office, shall take an oath to execute faithfully his duties.

§ 507. Duties; supervision by Attorney General.

(a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:

(1) Prosecute for all offenses against the United States;

(2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned;

(3) Appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury;

(4) Institute and prosecute proceedings for the collection of fines, penalties and forfeitures incurred for violation of any revenue law unless satisfied upon investigation that justice does not require such proceedings;

(5) Make such reports as the Attorney General shall direct.

(b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys, and attorneys appointed under section 503 of this title, in the discharge of their respective duties.

§ 508. Salaries.

The Attorney General shall fix the annual salaries of United States attorneys, assistant United States attorneys, and attorneys appointed under section 503 of this title within the following limitations:

* * * *

5. Executive Order No. 6166, promulgated on June 10, 1933, provides in pertinent part (5 U.S.C. (1958 ed.), pp. 139, 141):

§ 5. CLAIMS BY OR AGAINST THE UNITED STATES

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer is transferred to the Department of Justice.

* * * *

6. Reorganization Plan No. 2 of 1950, 15 F.R. 3173, 64 Stat. 1261, provides in pertinent part (5 U.S.C. (1958 ed), p. 185):

§ 1. TRANSFER OF FUNCTIONS TO THE ATTORNEY GENERAL

(a) Except as otherwise provided in subsection (b) of this section, there are hereby transferred to the Attorney General all functions of all other officers of the Department of Justice and all functions of all agencies and employees of such Department.

(b) This section shall not apply to the functions vested by the Administrative Procedure Act (60 Stat. 237) [section 1001 et seq. of this title] in hearing examiners employed by the Department of Justice, nor to the functions of the Federal Prison Industries, Inc., of the Board of Directors and officers of the Federal Prison Industries, Inc., or of the Board of Parole.

§ 2. PERFORMANCE OF FUNCTIONS OF THE ATTORNEY GENERAL

The Attorney General may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Justice of any function of the Attorney General, including any function transferred to the Attorney General by the provisions of this reorganization plan.

7. The Federal Rules of Criminal Procedure provide in pertinent part:

RULE 1. SCOPE

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

RULE 2. PURPOSE AND CONSTRUCTION

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

RULE 6. THE GRAND JURY

(a) Summoning Grand Juries.

The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

* * * *

(c) Foreman and Deputy Foreman.

The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who May be Present.

Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is

in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

* * * *

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) Waiver of Indictment.

An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents.

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in

a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

* * * *

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) Issuance.

Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. * * *

* * * *

RULE 10. ARRAIGNMENT

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

* * * *

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL: DEFENSES AND OBJECTIONS

(a) Pleadings and Motions.

Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

* * * *

RULE 48. DISMISSAL

(a) By Attorney for Government.

The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court.

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

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